

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHANIE R. WORKMAN,

Plaintiff,

Case No. 3:17-cv-327

vs.

COMMISSIONER OF SOCIAL SECURITY,

District Judge Thomas M. Rose

Magistrate Judge Michael J. Newman

Defendant.

REPORT AND RECOMMENDATION¹ THAT: (1) THE NON-DISABILITY FINDING AT ISSUE BE FOUND UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND REVERSED; (2) THIS MATTER BE REMANDED TO THE COMMISSIONER UNDER THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; AND (3) THIS CASE BE CLOSED

This is a Social Security disability benefits appeal. At issue is whether the Administrative Law Judge (“ALJ”) erred in finding Plaintiff not “disabled” and therefore unentitled to Supplemental Security Income (“SSI”). This case is before the Court upon Plaintiff’s Statement of Errors (doc. 12), the Commissioner’s memorandum in opposition (doc. 13), Plaintiff’s reply (doc. 14), the administrative record (doc. 8),² and the record as a whole.

I.

A. Procedural History

Plaintiff filed for SSI on July 31, 2014 (PageID 260) alleging disability as a result of a number of alleged impairments including, *inter alia*, plantar fasciitis, hypertension, osteoarthritis of the lower

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

² Hereafter, citations to the electronically-filed record will refer only to the PageID number.

extremities, degenerative disc disease of the lumbar spine, obesity, bipolar disorder and depressive disorder. PageID 109.³

After initial denial of her applications, Plaintiff received a hearing before ALJ Benjamin Chaykin on July 19, 2016. PageID 126. The ALJ issued a written decision on August 24, 2016 finding Plaintiff not disabled. PageID 106-21. The ALJ found at Step Five that, based upon Plaintiff's residual functional capacity ("RFC") to perform a reduced range of light work,⁴ "there are jobs that exist in significant numbers in the national economy that [she] can perform[.]" PageID 112-19.

Thereafter, the Appeals Council denied Plaintiff's request for review, making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 49-52. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

B. Evidence of Record

The evidence of record is adequately summarized in the ALJ's decision (PageID 106-21), Plaintiff's Statement of Errors (doc. 12), the Commissioner's memorandum in opposition (doc. 13), and Plaintiff's reply (doc. 14). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this appeal herein.

³ Plaintiff previously filed for DIB and SSI on December 10, 2010, alleging disability as of November 1, 2007. PageID 106. Following initial denial of those applications and a hearing before ALJ Irma J. Flottman, ALJ Flottman found Plaintiff not disabled in a decision issued on January 10, 2013. PageID 157-67. It appears Plaintiff did not seek further review of ALJ Flottman's decision, thus making it the final determination of the Commissioner for the period up through and including January 10, 2013, *i.e.*, the date of ALJ Flottman's decision. Accordingly, under principles of administrative *res judicata*, the earliest Plaintiff can be found disabled is January 11, 2013. *See Drummond v. Comm'r of Soc. Sec.*, 126 F.3d 837, 840-43 (6th Cir. 1997).

⁴ Light work "involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds" and "requires a good deal of walking or standing, or . . . sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 416.967(b). An individual who can perform light work is presumed also able to perform sedentary work. *Id.* Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties." *Id.* § 416.967(a).

II.

A. Standard of Review

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When substantial evidence supports the ALJ's denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a "'zone of choice' within which he [or she] can act without the fear of court interference." *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ's legal analysis -- may result in reversal even if the ALJ's decision is supported by substantial evidence in the record. *Rabbers v. Comm'r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). "[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right." *Bowen*, 478 F.3d at 746.

B. "Disability" Defined

To be eligible for disability benefits, a claimant must be under a "disability" as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a "disability" includes physical and/or mental impairments that are both "medically determinable" and severe enough

to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 416.920(a)(4). Although a dispositive finding at any step ends the ALJ’s review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), the complete sequential review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
3. Do the claimant’s severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner’s Listing of Impairments (the “Listings”), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant’s RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant’s age, education, past work experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 416.920(a)(4); *see also Miller v. Comm’r of Soc. Sec.*, 181 F. Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act’s definition. *Key v. Comm’r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

III.

On appeal, Plaintiff argues that the ALJ erred in: (1) evaluating and weighing the medical opinions in the record; and (2) reasonably assessing her credibility. PageID 642. Because the undersigned finds error in the ALJ’s assessment of the opinion of treating physician Jeffrey Bishop, M.D., the Court does not specifically address Plaintiff’s remaining arguments. Instead, the undersigned would direct that the ALJ consider Plaintiff’s arguments on remand.

Until March 27, 2017, “the Commissioner’s regulations [that apply to this appeal] establish[ed] a hierarchy of acceptable medical source opinions[.]” *Snell v. Comm’r of Soc. Sec.*, No. 3:12-cv-119,

2013 WL 372032, at *9 (S.D. Ohio Jan. 30, 2013). In descending order, these medical source opinions are: (1) treaters; (2) examiners; and (3) record reviewers. *Id.* Under the regulations in effect prior to March 27, 2017, the opinions of treaters are entitled to the greatest deference because they “are likely to be . . . most able to provide a detailed, longitudinal picture of [a claimant’s] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations[.]” 20 C.F.R. § 416.927(c)(2).

A treater’s opinions must be given “controlling weight” if “well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record.” *LaRiccia v. Comm’r of Soc. Sec.*, 549 F. App’x 377, 384 (6th Cir. 2013). Even if a treater’s opinion is not entitled to controlling weight, “the ALJ must still determine how much weight is appropriate by considering a number of factors, including the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinions, consistency of the opinions with the record as a whole, and any specialization of the treating physician.” *Blakley v. Comm’r of Soc. Sec.*, 581 F.3d 399, 406 (6th Cir. 2009); *see also* 20 C.F.R. § 416.927(c).

After treaters, “[n]ext in the hierarchy are examining physicians and psychologists, who often see and examine claimants only once.” *Snell*, 2013 WL 372032, at *9.

Record reviewers are afforded the least deference and these “non-examining physicians’ opinions are on the lowest rung of the hierarchy of medical source opinions.” *Id.* “The regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual [claimant] become weaker.” *Id.* (citing SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996)).

Here, the medical record contains the opinion of Dr. Bishop, Plaintiff’s long-standing treating psychiatrist. PageID 559. According to Dr. Bishop, Plaintiff suffers from chronic pain and psychological distress, and her mental impairment exacerbates her chronic physical pain. *Id.* Due to

Plaintiff's impairments, Dr. Bishop determined that Plaintiff would be absent from work two or more times a month and would, on average, be distracted for one-third of the workday. PageID 560-61. A Vocation Expert ("VE") testified at the hearing that Plaintiff would be unable to engage in competitive employment if she were off task as often as one-third of the workday. PageID 152.

In analyzing Dr. Bishop's opinion, the ALJ ultimately gave it "little weight," stating that:

Dr. Bishop did not provide any explanation or function-by-function analysis of how he arrived at such severe limitations. Additionally, his assessment of the impact of the claimant's psychological problems on her ability to work is inconsistent with her own repeated statements that medication helped her with few side effects.

PageID 118 (internal citations omitted). In weighing Dr. Bishop's treating opinion as it relates to Plaintiff's mental limitations, the ALJ: focused solely on the factors set forth in 20 C.F.R. § 416.927(c)(2)(i) and (4); failed to specifically mention the concept of controlling weight; failed to analyze the controlling weight factors; and never specifically declined to give Dr. Bishop's treating opinion controlling weight. PageID 118, 666. This lack of explanation regarding the "controlling weight [analysis] hinders a meaningful review of whether the ALJ properly applied the treating-physician rule that is at the heart of this regulation." *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 376 (6th Cir. 2013). While failing to conduct a controlling weight analysis can constitute harmless error, *see Id.* at 380, such failure is not harmless in this case because the record reveals findings⁵ that may support Dr. Bishop's opinion regarding Plaintiff's mental limitations.

Specifically, Dr. Bishop noted that, during examinations, Plaintiff appeared anxious, depressed in mood, and with constricted affect -- all findings that would appear supportive of his ultimate opinion. PageID 451. Similarly, examining psychologist Donald J. Kramer, Ph.D. noted that, during his examination of Plaintiff, "[h]er affect was depressed and anxious"; "[s]he was spontaneous but was

⁵ With regard to clinical findings of a mental impairment, the Sixth Circuit has "acknowledged the difficulty inherent in proving psychological disabilities." *Keeton v. Comm'r of Soc. Sec.*, 583 F. App'x 515, 526 (6th Cir. 2014). "[W]hen mental illness is the basis of a disability claim, clinical and laboratory data may consist of the diagnosis and observations of professionals trained in the field of psychopathology." *Id.* (quoting *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989)).

rambling and tangential and would digress into irrelevant detail”; she had to be frequently refocused; and “her short-term memory was uneven.” PageID 492-95.

In light of these findings by trained medical professionals upon examination, a reasonable fact-finder could conclude that Dr. Bishop’s opinion concerning Plaintiff’s mental health limitations is “well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence in the case record.” 20 C.F.R. § 416.927(c). Thus, the ALJ’s failure to conduct a specific controlling weight analysis fails to meet the goal of the Commissioner’s regulations in this instance, and such failure amounts to reversible error.

IV.

When the ALJ’s non-disability determination is unsupported by substantial evidence, the Court must determine whether to remand the matter for rehearing or to award benefits. Generally, benefits may be awarded immediately “if all essential factual issues have been resolved and the record adequately establishes a plaintiff’s entitlement to benefits.” *Faucher v. Sec’y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994); *see also Abbott v. Sullivan*, 905 F.2d 918, 927 (6th Cir. 1990). The Court may only award benefits where proof of disability is strong and opposing evidence is lacking in substance, so that remand would merely involve the presentation of cumulative evidence, or where proof of disability is overwhelming. *Faucher*, 17 F.3d at 176; *see also Felisky v. Bowen*, 35 F.3d 1027, 1041 (6th Cir. 1994); *Mowery v. Heckler*, 771 F.2d 966, 973 (6th Cir. 1985). In this case, evidence of disability is not overwhelming. Therefore, a remand for further proceedings is proper.

V.

IT IS THEREFORE RECOMMENDED THAT: (1) the Commissioner’s non-disability finding be found unsupported by substantial evidence, and **REVERSED**; (2) this matter be **REMANDED** to the Commissioner under the Fourth Sentence of 42 U.S.C. § 405(g) for proceedings consistent with this opinion; and (3) this case be **CLOSED**.

Date: October 9, 2018

s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based, in whole or in part, upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs.

A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).